IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 7050 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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GADH KELAVNI MANDAL & 1 - Petitioner(s)

Versus

DOLI D/OBHUPENDRA C CHAUHAN MINOR THROUGH HER FATHER & 5 - Respondent(s)

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Appearance :

MR SK JHAVERI for Petitioner(s) : 1,None for Petitioner(s) : None for Petitioner No(s).: for Petitioner(s) : 2,
NOTICE UNSERVED for Respondent(s) : 1,
MR MK OZA for Respondent(s) : 1,
None for Respondent(s) : 1.2.1,1.2.2
NOTICE SERVED for Respondent(s) : 1.2.3 - 3.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 19/12/2005

ORAL JUDGMENT

1. The petitioners have filed this petition under Articles 226 and 227 of the Constitution of India, praying for quashing and setting aside the judgment and order of the Gujarat Primary Educational Tribunal in Application No.102 of 1991 dated 13.6.1985, whereby the Tribunal has directed the petitioners to reinstate the respondent No.1 to her original post with back wages from 13.4.1991.

2. The petition was admitted on 23.11.1995. During the pendency of this petition, the respondent No.1 i.e., original applicant expired on 27.11.1995 and her legal heirs were brought on record by an order dated 18.7.1996 passed by this Court in C.A. No.4514/1996.

3. It is the case of the petitioners that the respondent No.1 was appointed as teacher on 1.3.1984. The respondent No.1 was holding

Primary Teacher Training Certificate and as she was trained under the prevailing rule she was appointed. It is also the case of the petitioner that the respondent No.1 joined B.Ed course without requisite permission from the petitioners and did not report for the duty without any sanctioned leave. The respondent No.1 applied for leave on 18.6.1990, which was not sanctioned by the petitioners but the same came to be rejected by the resolution dated 28.7.1990. The respondent No.1 was informed by letter dated 1.8.1990. It is also the case of the petitioners that the respondent No.1 approached the District Primary Education Officer against the resolution of the petitioners by way of an application which was forwarded by the respondent No.2 on 21.11.1990. The petitioners, thereafter, issued letter on 5.9.1990 calling upon the respondent No.1 to resume duty failing which

appropriate action will be taken against her. The said letter was also produced before the Tribunal at Ex.34. Thereafter, the respondent No.1 was charge-sheeted on 5.9.1990 for unauthorized leave and non-reporting for duty inspite of her leave application came to be rejected by the petitioners. It is also the case of the petitioners that the petitioners have appointed substitute teacher in place of respondent No.1 so that students may not suffer in absence of a teacher. The respondent No.1 completed her B.Ed course and tried to resume duty on 13.4.1991 but the petitioners have already appointed a substitute teacher in place of respondent No.1 and passed a resolution that the respondent No.1 may not be allowed to resume the duty.

4. Being aggrieved by the said resolution the respondent No.1 approached the Tribunal by way

of an application No.102 of 1991 against the petitioners and prayed for the reinstatement with back wages. During the pendency of the said application before the Tribunal the respondent No.1 tried to resume the duty on 20.7.1991, despite the fact that she was not in town. She already got married in February, 1991 and was staying with her husband in Vidisa, 60 km., away from Bhopal. The Tribunal, thereafter, directed the petitioners and the respondent No.1 to implement the order of the Tribunal vide its letter dated 5.7.1991. A letter was issued on 1.1.1993 by the respondent No.2 to respondent No.1 to remain present in the school on 7.1.1993. However, the respondent No.1 did not remain present though the Education Inspector was present in the school on that day. The District Primary Education Officer again issued notice to the respondent No.1 to appear before the respondent

No.2 on 15.2.1993 but she has not appeared and accordingly the respondent No.2 filed report before the Tribunal on 25.5.1993 stating that the respondent No.1 was not present despite the specific letters were issued on her.

5. The Tribunal has passed an order on 13.5.1995 holding that the respondent No.1 has asked for leave which has been granted and that the respondent No.1 tried to resume her duty on 13.4.1991, however, because of the condition imposed she did not remain present. However, the respondent No.1 was prevented by the petitioners from resumption of her duty and hence action of the petitioners was illegal, arbitrary and accordingly order was passed to reinstate the respondent No.1 with back wages from 13.4.1991.

6. It is this order which is under challenge in

the present petition.

7. Mr.S.K.Jhaveri, learned advocate appearing for the petitioners submitted that the Tribunal has not considered the materials which were produced before it and in turn certain adverse inferences were drawn. He has further submitted that the respondent No.1 has not resumed duty inspite of notice dated 5.9.1990. It is further submitted that the respondent No.1 has refused to report on 31.7.1991 under the pretext that it was a conditional order. He has further submitted that the respondent No.1 has not reported for duty on 7.1.1993 and has not reported before the respondent No.2 on 15.2.1993. He has further submitted that the respondent No.1 has committed misconduct by joining B.Ed course without permission of the petitioners and has proceeded on leave without sanction. He has further submitted that the

respondent No.1 ought to have reported for duty after the receipt of refusal order of leave application dated 18.6.1990. The same was received by the respondent No.1 before 7.8.1990 since she had made an application before the respondent No.2 against the said order. He has further submitted that the Tribunal has failed to consider vital aspect of the matter that the respondent No.1 could not have reported for duty after 3.2.1991 i.e., after her marriage. The letters issued by the petitioners as well as respondent No.2 were by registered posts and they were signed by different persons in the name of respondent No.1 and in many proceedings instead of respondent No.1 her father has reported before the authorities. Mr.Jhaveri has further submitted that even before the respondent No.2 in the month of January, and February, 1993 the respondent No.1 has not reported and her father was present, which

established that the respondent No.1 was not in a position to resume the duty. He has further submitted that the Tribunal has also ignored the documents produced by the petitioners and the report of the respondent No.2 dated 25.5.1993 at Ex.38 and thereby has committed serious irregularity by granting full back wages.

8. Mr.Jhaveri has further submitted that since the respondent No.1 has expired on 27.11.1995, there is no question of reinstatement. So far as back wages are concerned, the respondent No.1 was not entitled to get the back wages as she has not resumed the duty despite repeated attempts made by the petitioners. In support of his submission he relied on the decision of the Hon'ble Supreme Court **in the case of State of Punjab vs. Jagir Singh, reported in AIR 2004 Supreme Court 4757**, wherein the Hon'ble Supreme

Court has observed that despite several opportunities the workman did not join his duties at all. The Court, therefore, took the view that the Labour Court and High Court committed manifest error in granting back wages in his favour.

9. Mr.Jhaveri has further relied on the decision of Hon'ble Supreme Court **in the case of Baldev Singh vs. Union of India and Ors., reported in JT 2005(10) SC 213**, wherein the Hon'ble Supreme Court has observed that as the factual position noted clearly indicates that the appellant was not in actual service for the period he was in custody, merely because there has been an acquittal does not automatically entitled him to get salary for the concerned period. This is more so, on the logic of no work no pay. It is to be noted that the appellant was terminated from service because of the

conviction. Effect of the same does not get diluted because of subsequent acquittal for the purpose of counting service. The said position was clearly stated in Ranchhodji Chaturji Thakore vs. Super Intendent Engineer, Gujarat Electricity Board, Himmatnagar (Gujarat) and Anr., (1997 (1) SLR 14). The Court, therefore, held that the appellant having not rendered service, the question of inclusion of the period, does not arise and if the said period is excluded then the inevitable conclusion is that the appellant has not rendered the requisite period i.e., service of 15 years in order to be entitled to pension.

10. Mr.Jhaveri based on the aforesaid decisions submitted that despite the repeated attempts made by the petitioners asking respondent No.1 to resume her duty, the respondent No.1 has not resumed because of her own circumstances and

she has been avoiding the resumption of her duty after taking shelter that she was allowed to resume duty only on certain conditions. Mr.Jhaveri further submitted that the principle of no work no pay is well settled and even on that ground also the order regarding back wages is required to be quashed and set aside.

11. Mr.M.K.Oza, learned advocate appearing for the respondent No.1 has submitted that the Education Tribunal has passed the order after considering the entire facts and circumstances of the case and the evidence that has been led before the Tribunal. Since the order is passed after considering facts and appreciating evidence produced before it, this Court while exercising its power under Article 227 of the Constitution of India, should not interfere with the said order. He has further submitted that the Tribunal has given clear cut finding

of facts that her initial leave was sanctioned by the petitioner and once the leave has been sanctioned, the respondent No.1 should not be restrained from resuming her duty. He has further submitted that the respondent No.1 in fact tried to resume her duty on 13.4.1991, however, she was not allowed to resume and certain conditions were imposed. These conditions were prejudicial to her service. He has further submitted that the Tribunal has also given finding that the respondent No.1 was not informed about hearing before the respondent No.2 and there was no evidence that such letters were received by the respondent No.1. Considering all these aspects of the matter, the Tribunal has passed the impugned order directing the petitioners to reinstate the respondent No.1 with back wages with effect from 13.4.1991.

12. Mr.Oza further submitted that since the order passed by the Tribunal was not complied with by the petitioners, the respondent No.1 has filed the Contempt Petition before this Court in MCA No.859/1995. In that contempt petition, the Division Bench has directed the petitioners to pay Rs.66,850/- being 40% of the amount awarded by the Educational Tribunal. The said amount has already been paid by the petitioners and the same was directed to be invested in long term deposit in the name of legal heirs of the respondent No.1. Since the respondent No.1 has already expired the amount is standing in the name of minor children of the respondent No.1. The order passed by the Educational Tribunal should not therefore be interfered with and the petition is required to be dismissed.

13. After having heard the learned advocates appearing for the respective parties and after

having gone through the order passed by the Educational Tribunal and the submissions made before the Court and the authorities cited, the Court is of the view that the Tribunal has drawn certain inference from the facts and evidence placed before the Court which in fact did not warrant. It is an admitted position that the respondent No.1 has not taken prior permission of the petitioners before joining B.Ed course. There is also dispute regarding the fact that whether leave was sanctioned by the petitioners or not. As a matter of fact on 18.6.1990 when application was moved there was no order from the petitioners sanctioning leave. On the contrary the said application was rejected and rejection was conveyed. Despite this rejection, the respondent No.1 has not resumed her duty. Thereafter, disciplinary proceedings were initiated by the petitioners for misconduct of unauthorized leave. It is

also the fact that after completion of the B.Ed Course, the respondent No.1 did not join duty. On 31.7.1991 she was allowed to resume on certain conditions. There is nothing wrong in imposing such conditions. As a matter of fact, resolution on which reliance was placed, makes clear that her services may be considered as untrained teacher. Even otherwise, after resuming her duty, order could have been challenged by her before the Tribunal. During the pendency of the proceeding before the Tribunal several notices were given and directions were issued to respondent No.1 yet she has not resumed on any of the occasions. Report to this effect was also filed by the respondent No.2 before the Educational Tribunal. Reason is very obvious for not resuming duty, as the respondent No.1 got married in February, 1991 and thereafter she has left for Vidisa town 60 km., away from

Bhopal. It is but natural that because of the marriage and because of her stay with her husband she could not remain present. It has also come on record that her father appeared before the Tribunal. Considering all these aspects it is not just and proper on the part of the Tribunal to award reinstatement with back wages. The Court is, therefore, of the view that the order passed by the Tribunal seems to be unjust and unreasonable and it leads this Court to exercise its jurisdiction under Articles 226 and 227 of the Constitution of India. The order is, therefore, quashed and set aside. The petition is accordingly allowed.

14. By virtue of allowing this petition and quashing the order of Tribunal, the amount which has been paid by the petitioners and invested in the name of legal heirs of

respondent No.1 are liable to be refunded to the petitioners. Mr.Jhaveri as a matter of fact has pressed for this order on the ground that the petitioners were facing financial crises and out of borrowing, the said amount has been paid. As against this Mr.Oza submitted that the respondent No.1 has expired and her two minor children are there, considering this aspect, on humanitarian ground, this Court should not pass any order with regard to refund of the said amount.

15. Considering the facts and circumstance of the case and further considering the decision of Tribunal and taking humanitarian approach, the Court is of the view that the amount which has been already paid by the petitioners pursuant to the Division Bench order passed in Contempt Petition, should not be refunded to the petitioners. This course is adopted by the

Court only in exceptional circumstance and considering the whole issue on humanitarian ground and hence it should not be treated as precedent. Mr.Oza submitted that he will not press for the contempt petition and withdraw the same before the Division Bench.

16. Since the petitioners are getting grant from the Government and under compelling circumstances the petitioners have to pay this amount to the legal heirs of the respondent No.1 and though the order passed by the Tribunal is quashed and set aside by this Court, the legal heirs of the respondent No.1 are allowed to retain the said amount, the State Government, through respondent Nos.2 and 3 is hereby directed to reimburse the said amount to the petitioners treating the same towards the salary and/or back wages of respondent No.1, as per the order of the

Educational Tribunal.

17. Subject to the aforesaid observations and directions, this petition is accordingly disposed off without any order as to costs.

(K. A. PUJ, J.)

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